

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRIAN A GLASSER, AS TRUSTEE
OF THE YELLOWSTONE CLUB
LIQUIDATING TRUST,

Plaintiff,

v.

JESSICA T. BLIXSETH et al. ,

Defendants.

CASE NO. C14-1576 RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on defendant Cherrill B. Ferguson's motion for summary judgment. Dkt. # 62. For the reasons stated below, Ms. Ferguson's motion is DENIED.

II. BACKGROUND

The facts of this case have been summarized in several previous orders. *See* Dkt. ## 13, 48, 99. In short, this matter involves the alleged fraudulent transfer of assets from Western Air & Water, LLC ("WAW"), an entity owned by Mr. Timothy Blixseth, to

1 JTB, LLC, an entity owned by Mr. Blixseth's wife, Jessica. The assets of WAW
2 consisted of: (1) a Citation aircraft, (2) a 58 foot fishing boat – the “Piano Bar Too” and
3 (3) a 156 foot yacht – the “Piano Bar.” Dkt. # 52 at ¶ 46.

4 The instant motion relates to the proceeds of the sale of the Piano Bar yacht. The
5 Piano Bar sold for \$1,620,000 on September 14, 2014. Dkt. # 62, p. 3. It appears that
6 Mrs. Blixseth deposited this amount into her personal Key Bank account and later, on
7 October 14, 2014, transferred \$600,000 of those proceeds to her mother, Ms. Ferguson.
8 *Id.*, p. 3. According to Mrs. Blixseth, she planned to use those funds as collateral for a
9 loan from American Bank. She claims that she transferred the funds to her mother, to be
10 held by her temporarily, until the American Bank account could be set up. Dkt. # 41 ¶ 4.

11 On October 21, 2014, Ms. Ferguson transferred the \$600,000 to American Bank.
12 Dkt. #60. She has filed a declaration stating that she was acting at Jessica's direction and
13 that she never had “any ownership interest in, or right to use or right to control the
14 disposition of the funds” that had been transferred into her account. *Id.* Mrs. Blixseth
15 and Ms. Ferguson contend that they operated pursuant to an oral agreement. (Reply) Dkt.
16 # 72, p. 4.

17 The court later held a hearing in this matter related to plaintiff's motion for
18 prejudgment writ of attachment on one of Mrs. Blixseth's homes. Dkt. # 111. At this
19 hearing, Mrs. Blixseth testified regarding the \$600,000 transfer of funds from herself to
20 her mother. Dkt. # 116. The court learned that Mrs. Blixseth's “loan” from American
21 Bank was actually a line of credit to herself, *i.e.*, she deposited \$600,000 with American
22 Bank and then “borrowed” the cash from herself. *See* (Kinsel Decl.) Dkt. # 91, pp. 16,
23 25, 28; Dkt. # 94, p. 4. (admitting this “unfortunate fact”). The court found that this
24 pseudo “lien” on the funds strongly suggested that Mrs. Blixseth was attempting to place
25 the \$600,000 beyond the reach of creditors. *See* (Order) Dkt. # 116, p. 3 (finding that
26 “[o]n its face, this pseudo loan transaction appears to be a violation of this court's
27 injunction and a blatant attempt to hinder present and future creditors”).

III. ANALYSIS

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986). On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets the initial burden, the opposing party must set forth specific facts showing that there is a genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

A. Ms. Ferguson's Potential Liability Under the UFTA

Under the Uniform Fraudulent Transfer Act, a transfer is fraudulent if the debtor made the transfer with the actual intent to hinder, delay or defraud any creditor of the debtor. RCW § 19.40.041(a)(1).¹ In determining "actual intent" consideration may be

¹ The parties have failed to make any coherent arguments regarding the applicable law. To the extent Washington law applies, the court sees no conflict between RCW § 19.40.041 and N.R.S. § 112.180. *See Patton v. Cox*, 276 F. 3d 493, 495 (9th Cir. 2002) ("A federal court sitting in diversity applies the forum state's choice of law rules."); *see also Erwin v. Cotter Health Ctrs.*, 161 Wash. 2d 676, 692 (2007) ("When parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before the court will engage in a conflict-of-laws analysis.").

1 given to the following factors, among others: “(1) the transfer or obligation was to an
 2 insider, (2) the debtor retained possession or control of the property transferred after the
 3 transfer...(4) before the transfer was made or obligation was incurred, the debtor had
 4 been sued or threatened with suit....” RCW § 19.40.041(b). Judgment may be entered
 5 against either (1) the first transferee of the fraudulently transferred asset or (2) “any
 6 subsequent transferee other than a good-faith transferee...who took for value or from any
 7 subsequent transferee.” RCW § 19.40.081 (emphasis added).

8 Both parties cite *In re Mortgage Store, Inc.*, 773 F.3d 990 (9th Cir. 2014) and
 9 spend significant time discussing the “dominion” test. *In re Mortgage Store* is simply
 10 inapposite. As explained by the Ninth Circuit:

11 Under § 550(a) [the Bankruptcy Code’s fraudulent transfer
 12 provision], “[t]he trustee’s right to recover from an *initial*
 13 *transferee is absolute.*” A trustee may recover from a
 14 subsequent transferee—that is, any transferee not an initial
 15 transferee—but the *subsequent transferee will be allowed to*
 16 *assert affirmative defenses* that, if successful, will prevent
 17 recovery...Section 550(a) does not define the term “initial
 18 transferee.” In the absence of a statutory definition, we apply
 19 the so-called “dominion test” to determine whether a party is
 20 the initial transferee... As the Seventh Circuit explained in
 21 the widely-cited case *Bonded Financial Services, Inc. v.*
 22 *European American Bank*, an individual will have dominion
 over a transfer if, for example, he is “free to invest the whole
 [amount] in lottery tickets or uranium stocks.” The first party
 to establish dominion over the funds after they leave the
 transferor is the initial transferee; other transferees are
subsequent transferees.

23 *In re Mortgage Store*, 773 F.3d at 994-95 (citations omitted)(emphasis added).

24 Thus, the “dominion” test is used to determine “initial transferee” status. Here, the
 25 record clearly demonstrates that Ms. Ferguson could not have been the initial transferee
 26 of the asset at issue – the Piano Bar yacht. Ms. Ferguson’s receipt of the proceeds of the
 27

1 sale occurred after a number of transfers from WAW then to JTB, LLC then to Mrs.
2 Blixseth's personal bank account. Accordingly, the "dominion" test is irrelevant to Ms.
3 Ferguson's potential liability under the UFTA.

4 Ms. Ferguson is plainly a subsequent transferee.² The only way for her to obtain
5 summary judgment would be to establish that there are no disputed issues of fact with
6 respect to her good faith affirmative defense. She has failed to do so. The only evidence
7 she submitted in connection with this motion are self-serving declarations from herself
8 and her daughter. At the time this motion was filed and fully-noted, the parties had not
9 completed discovery and Ms. Ferguson was refusing to be deposed. *See* Dkt. # 146
10 (Order compelling Ms. Ferguson's attendance at deposition).

11 The court has expressly found that the circumstances surrounding the transfer of
12 assets in this matter are extremely suspicious. (Order) Dkt. # 48. Indeed, plaintiffs have
13 presented evidence that Ms. Ferguson may have assisted her daughter in attempting to
14 avoid service of process in this matter (*see* Dkt. # 25) and possibly participated in her
15 daughter's effort to set up a pseudo-lien on funds that were subject to an injunction issued
16 by this court. Dkt. # 99.

17 Of course, Ms. Ferguson disputes these facts, but this factual dispute is exactly
18 why summary judgment would be inappropriate.

22
23 ² Courts routinely hold subsequent transferees liable under the UFTA. *See, e.g.,*
24 *Thompson v. Hanson*, 168 Wash. 2d 738, 745-46 (2009) (finding transferees, a judgment
25 debtor's sole shareholder and the shareholder's wife who accepted a transfer from the
26 debtor, were subject to personal liability under the UFTA); *see also Warfield v. Byron*,
27 436 F.3d 551, 557-58 (5th Cir. 2006) (holding that Washington's Uniform Fraudulent
Transfer Act permits entry of judgment even without proof that the transferee knowingly
accepted property and intended to assist the debtor in evading the creditor).

IV. CONCLUSION

For all the foregoing reasons, Ms. Ferguson's motion for summary judgment is DENIED.

Dated this 2nd day of March, 2016.

A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

The Honorable Richard A. Jones
United States District Court